Exception No. 1

For the reasons discussed in Section I of SBC Illinois' Brief on Exceptions, the Commission should either modify the Proposed Order as indicated below under Exceptions 10 and 12, to adopt SBC Illinois' proposed lawful UNE and declassification language, and/or it should modify the Proposed Order's conclusions with respect Issues SBC-5 and SBC-7 as indicated below:

The Analysis and Conclusions section for Issue SBC-5, which begins at page 66 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC-5a. The parties have settled this sub-issue.

SBC-5b. . . . .

Substantively, we agree with SBC and Staff that there are not currently effective FCC rules requiring that dark fiber transport be unbundled, and with SBC that there are not currently effective FCC rules requiring that dark fiber loops be unbundled. SBC Init. Brief at 65, fn. 29; Staff Reply Br. at 30. The court of appeals vacated and remanded the FCC's national impairment finding with respect to dedicated transport and high capacity loop elements, including dark fiber. USTA II, 359 F.3d at 594. Thus, the parties' contract amendment must reflect that there currently is no unbundling requirement with respect to dedicated transport or high capacity loops, including dark fiber loops or dark fiber dedicated transport. ~~Since the sole purpose of this arbitration is to incorporate viable elements of the TRO into the SBC/XO ICA, nothing remains, under federal law, for incorporation with regard to dark fiber transport.~~

The Analysis and Conclusions section for Issue SBC-7, which begins at page 76 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

Taken literally, this issue is virtually self-resolving. Since the purpose of this arbitration is to incorporate the viable provisions of the TRO into the Parties' ICA, it obviously follows that TRO modifications to unbundled local switching and transport should be so incorporated.

However, given that USTA II vacated the FCC's impairment determinations regarding mass market switching, the TRO provisions (and associated FCC regulations) that impose a federal unbundling requirement for such switches should not be brought into the ICA. To the contrary, the parties' contract amendment must reflect that there is currently no unbundling requirement with respect to mass market switching. That leaves what the FCC characterizes as "enterprise" switching and shared local transport. . . . .

. . .

Third, regarding enterprise switching . . . .Furthermore, the "final, non-appealable" requirement is insupportable in its own right, for reasons articulated previously in this Decisions. The parties' contract amendment must reflect that there is currently no unbundling requirement with respect to enterprise switching and associated shared local transport, either.

Exception No. 2:

For the reasons discussed in Section II of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:[1]

The Analysis and Conclusions section for Issue SBC-1, which begins at page 44 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC-1. . . .

SBC-1 & SBC/XO-1b. ~~Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis. "[T]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." TRO, ¶ 653. However, the FCC also held that Section 271 "does not require TELRIC pricing" for elements unbundled pursuant to that statute. TRO ¶ 659. Instead, prices for Section 271 UNEs must be just, reasonable and non-discriminatory, per Sections 201 and 201 of the Federal Act. TRO ¶ 656.~~

The Parties' disagreement respecting 271 UNEs is reflected in so many provisions throughout their respective proposed TRO Attachments that we cannot address them individually. Nevertheless, certain principles should be adhered to throughout the Parties' ICA. Language requiring SBC to offer network elements under Section 271, or that would establish rates, terms, or conditions for Section 271 network elements, should not appear in the parties' contract amendment. While XO asserts that Section 271 creates an unbundling obligation that is independent of Section 251, that is not the issue here. Rather, the issue is whether the Commission has any authority to implement or enforce the requirements of Section 271. It does not. The Commission agrees with SBC Illinois that such authority resides in the FCC, and not in state commissions. ~~Language relieving SBC of its obligation to unbundled elements under Section 271 is prohibited; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited; correspondingly, language authorizing SBC to offer 271, qua 271 UNEs, at prices determined per the criteria Sections 201 and 201 of the Federal Act is permissible.~~

The Analysis and Conclusions section for Issue SBC-4, which begins at page 61 of the Proposed Order, should be modified as follows

[1] The modifications shown below also incorporate some of the modifications proposed by SBC Illinois in Exception No. 11 with respect to state law (because some of the same sentences and paragraphs are involved).

2. Analysis and Conclusions

SBC-4a & c. . . .

SBC-4b. SBC's proposed text would essentially incorporate the language of 47 CFR 51.319(a)(2) into the ICA. Despite XO's claim to the contrary, XO Reply Br. at 41, that text includes the degree of access to broadband capabilities required by the FCC. Such language is unobjectionable and the Commission approves it.

The Parties' real disagreement concerns XO's demand (in XO proposed Section 3.1.4.1) for access to the broadband transmission capabilities of hybrid loops to the extent such access is required under Section 271 of the Federal Act or under state law. SBC argues, first, that this Commission lacks authority to address the terms and conditions of access to Section 271 UNEs and, second, even if we do have such authority, the modified TRO precludes the conclusion that 271 UNEs must be offered at TELRIC prices. SBC Reply Br. at 47.

~~SBC has apparently not petitioned the FCC, pursuant to Section 253(d) of the Federal Act, to preempt our authority over Section 271 UNEs. And Section 271, in turn, does contain unbundling requirements that are independent of Section 251. TRO ¶ 653. With respect to pricing, XO's proposed text does not request UNE access at TELRIC prices. Thus, XO's references to Section 271 and "state law" would give XO no more than whatever those authorities would provide.~~ As stated above, SBC is correct. State commissions do not have authority over Section 271 network elements; such authority is reserved by the Act to the FCC. Moreover, s~~S~~ince SBC correctly interprets the TRO (e.g., ¶ 656) and USTA II, TELRIC pricing is not accorded to 271 UNEs under federal law.

Therefore, we conclude that XO's references to Section 271 are not permissible. ~~and state law are permissible. However, t~~To prevent over-reaching, and to keep XO's text within the boundaries of this arbitration, we revise XO's proposed Section 3.1.4 as follows: "SBC Illinois shall provide nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities, to the extent required by 47 CFR 51.319(A)(2), ~~Section 271 of the Act~~ and state law to the extent not inconsistent with federal law."

The Analysis and Conclusions section for Issue SBC-7, which begins at page 76 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

Taken literally, ...

First, we disagree with XO that the amended ICA should recognize any unbundling obligation imposed by Section 271 of the Federal Act, as explained above. ~~As we held previously in this decision, the TRO declares that Section 271 creates an~~

~~unbundling requirement that is distinct from the Section 251 requirement, TRO ¶ 653, although 271 UNEs need not be TELRIC priced. TRO ¶ 659.~~ Any state-required unbundling should also be accounted for in the ICA, with the caveat the SBC Illinois is not required to adhere to any state-required unbundling requirements that have been found inconsistent with federal law.

The Analysis and Conclusions section for Issue SBC-8, which begins at page 78 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . . ~~Specifically, Section 271 obligations should be accounted for in any amended ICA provisions pertaining to call-related data bases, LIDB and CNAM, with the understanding that TELRIC prices are not associated with Section 271 under federal law.~~

The Analysis and Conclusions section for Issue SBC-14, which begins at page 88 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

The Commission adopts ~~rejects~~ SBC's proposed Section 7. As stated above, state commissions have no authority to implement or enforce Section 271, and have no authority to impose requirements regarding the rates, terms, and conditions of Section 271 network elements. XO's proposal that the Commission require SBC Illinois to apply its existing performance remedy plan to Section 271 network elements is thus beyond this Commission's authority and would be unlawful. ~~It is an attempt to remove Section 271 network elements from the operation of the performance remedy plan adopted in connection with SBC's long-distance approval under Section 271 (insofar as that plan is identified in the Parties' ICA). As Staff aptly states, the performance remedy plan is a "Commission-approved bulwark against SBC's potential failure to honor its market-opening obligations after receiving Section 271 authority." Staff Reply Br. at 39.~~

~~SBC's contention, at SBC Reply Br. at 65, that network elements are fundamentally different under, respectively, Sections 251 and 271, is incorrect in the context of the performance remedy plan. That plan is intended to create disincentives to SBC failure to perform its pro-competitive obligations, irrespective of the specific statute, regulation or order that imposes any particular such obligation.~~

Exception No. 3:

For the reasons discussed in Section III of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue SBC-5, which begins at page 66 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . . Substantively, we agree with SBC and Staff that there are not currently effective FCC rules requiring that dark fiber transport be unbundled, and with SBC that there are not currently effective FCC rules requiring that dark fiber loops be unbundled. SBC Init. Brief at 65, fn. 29; Staff Reply Br. at 30. The court of appeals vacated and remanded the FCC's national impairment finding with respect to dedicated transport and high capacity loop elements, including dark fiber. USTA II, 359 F.3d at 594. Thus, the parties' contract amendment must reflect that there currently is no unbundling requirement with respect to dedicated transport or high capacity loops, including dark fiber loops or dark fiber dedicated transport. ~~Since the sole purpose of this arbitration is to incorporate viable elements of the TRO into the SBC/XO ICA, nothing remains, under federal law, for incorporation with regard to dark fiber transport.~~

For the same reason, SBC Illinois is not currently required to provide EELs, including XO's so-called "dark fiber EEL." The FCC defines an EEL to include only a combination of an unbundled loop and unbundled dedicated transport. 47 C.F.R. § 51.5; TRO, ¶ 575. But because SBC Illinois is not currently required to provide one of the required elements (unbundled dedicated transport) at all, and is not currently required to provide unbundled high capacity loops (which include dark fiber loops), there are in essence no UNEs available to combine to form an EEL, and the parties' contract amendment should reflect that. ~~However, the Commission does not agree with SBC that the TRO provisions pertaining to access to EELs, including dark fiber EELs[2], were overturned by USTA II. Although an EEL includes a transport component, it is not transport. It is a different, more comprehensive service that plays a particular role in promoting market competition. TRO ¶ 576. Access to EELs is accorded separate treatment and analysis in the TRO and USTA II, apart from the treatment and analysis accorded access to dedicated transport[3]. *E.g.*, TRO, ¶ 575 *et seq.*; USTA II, 359 F.3d at 590.~~

[2] ~~We also disagree with SBC's assertion that dark fiber EELs were not "contemplate[d]" in the TRO. SBC Reply Br. at 49. A dark fiber EEL is simply a combination of separate elements, as described by the FCC. TRO ¶575. DS1 and DS3 are merely capacity designations for the same facilities that can be "lit" or left "dark."~~

[3] ~~We distinguish EEL access here from EEL pricing. Given the reversal of the FCC's impairment finding, it is not clear that the dedicated transport component of an EEL is currently subject to TELRIC pricing under federal law. Moreover, the vacatur of impairment rulings in the TRO by USTA II does not mean that the there are no effective~~

~~XO says that its "primary concern" with SBC's proposed text is that SBC's collocation requirement (in the SBC central office(s) where the pertinent fiber terminates) would prevent XO from obtaining dark fiber EELs. XO Reply Br. at 44. XO acknowledges that a collocation requirement is generally valid, but avers that collocation need not be at the particular SBC central office where dark fiber terminates. *Id*., 44-45. We agree, and find SBC's rationale for its proposed provisions unpersuasive. The TRO passages on which it relies (¶ 313 and ¶ 382) do refer to "necessary…collocations" but do not address – much less establish a rule about – where collocation must occur.~~

~~We agree with XO that the FCC concluded that EELs facilitate competition, innovation and efficient deployment of resources. TRO ¶ 576. Accordingly, the Commission holds that collocation within the pertinent LATA can constitute the "necessary collocations" referred to in the TRO. We note that XO will still be subject to the eligibility criteria promulgated by the FCC in the TRO, as incorporated into the Parties' ICA.~~

~~Regarding state law, XO is correct that this Commission held in Docket 01-0614 that Section 13-801 of the PUA does not countenance a collocation requirement for termination of EELs. It certainly follows that state law does not require collocation *at a specific central office* for dark fiber EELs. Additionally, although SBC charges that XO presented no "evidence" that SBC's proposed collocation requirements would fail to implement the maximum development of competitive service offerings, as Section 13-801 mandates, the FCC has concluded that EELs reduce a CLEC's collocation costs, thereby (as noted above) "facilitat[ing] the growth of facilities-based competition in the local market." TRO ¶ 576. That is sufficient refutation of the competition-enhancing potential in SBC's collocation requirement. Therefore, we conclude that SBC's dark fiber loop collocation requirement should be modified so that collocation at an SBC central office *within the LATA* satisfies the requirement.~~

~~. . . .~~

~~federal rulings on EELs. The viability and impact of, *e.g.*, the Local Competition Order and USTA I, must be assessed. That said, the parties do not present here an open issue on EEL pricing and we reach no conclusions on that subject.~~

Exception No. 4:

For the reasons discussed in Section IV of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue SBC-3, which begins at page 56 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

[footnote 39:] The Commission ~~does not~~ agrees with SBC's assessment of the impact of USTA II on the FCC's unbundling of DS3 loops. The D.C. Circuit clearly vacated the FCC's high capacity loop rules in concert with its discussion and vacatur of the FCC's dedicated transport rules. That is, the D.C. Circuit addressed the FCC's "national impairment findings with respect to DS1, DS3, and dark fiber" lumping both the high capacity loop and dedicated transport rules together, and vacating both. *USTA II*, 359 F.3d at 574. Thus, the parties' contract amendment should reflect that SBC Illinois is not currently required to provide unbundled access to high capacity loops (or, for that matter, dedicated transport). ~~The court did not remand or vacate the FCC's loop access rules.~~

Exception No. 5:

For the reasons discussed in Section V of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue XO-1, which begins at page 8 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . .

Given the state of the record, however, the Commission can only provide principles that the parties will have to apply in order to amend their ICA in accordance with this Decision. First, SBC is prohibited from imposing a charge for any cost already recovered through its existing UNE rates or any other rate. ~~In any subsequent proceeding before this Commission, SBC shall bear the burden of proving that a cost is not so recovered.~~ Second, SBC may impose a charge, on an ICB basis, for any routine network modification cost that is not recovered through existing UNE rates (or any other rate) and for any network modification cost that is not "routine" (see below).

. . .

We agree, however, with ~~similarly disregard~~ SBC's objection that "tasks listed by XO regarding cross-connects and terminating a DS1 loop to the appropriate NID do not appear anywhere in the *TRO*"s discussion of ordinary network modifications." SBC Init. Br. at 5. Again, the distinguishing characteristic of a routine network modification is whether the ILEC performs it for its own customers, not whether it is expressly mentioned in the TRO. TRO ¶ 634. That said, XO has not presented any evidence that the additional tasks it proposes to list in the parties' contract amendment satisfy the FCC's definition of a routine network modification. (In fact, after USTA II, any reference by XO to DS1 loops, for example, is moot anyway, as high-capacity loops are no longer required to be unbundled.) Without such evidence, the Commission has no basis to conclude that these tasks are or are not routine network modifications, and thus XO's proposed language is rejected.

. . . .

Exception No. 6:

For the reasons discussed in Section VI of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue XO-2, which begins at page 16 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . .

XO Issue 2-b. The Commission approves SBC Illinois' proposed language providing for use of the BFR process in those instances where standardized processes have not already been developed. SBC Illinois cannot possibly determine every possible commingling arrangement that a CLEC might request, and thus cannot reasonably be expected to establish in advance standardized ordering processes for each and every arrangement. Moreover, the parties' contract should specify the process that should be used in instances where no processes are already in place, rather than remain silent as XO proposes. The BFR process, which has been reviewed, considered, and approved by the Commission in the past, is the appropriate process for such instances. ~~SBC's proposed BFR process is cumbersome and, as a standardized procedural requirement, unnecessary. Although SBC is correct that this Commission has previously approved the BFR process for "specialized requests," SBC Init. Br. at 11, SBC has not established that commingling is typically (or even frequently) a specialized request. Indeed, XO maintains, and we concur, that commingling is generally comparable to a billing change. XO Init. Br. at 9. This is not to say that a BFR would never be appropriate for an individual commingling request. But a BFR, which can involve several months just for an SBC *response*, e.g., SBC Init. Br. at 11, is inapposite (and arguably anti-competitive) as a standardized mechanism for requesting commingling.~~

. . . .

Exception No. 7:

For the reasons discussed in Section VII of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue XO-2, which begins at page 16 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . .

XO Issue 2-c. The Commission rejects XO's attempt to require SBC Illinois to perform commingling activities on XO's behalf, and at XO's demand, for free. XO suggests that SBC Illinois is not entitled to cost recovery for the work it performs simply because the FCC did not address cost recovery with respect to commingling in the *TRO*. XO's suggestion is without merit. Section 252 of the Act and the FCC's TELRIC pricing rules establish a right of cost recovery, and the FCC's silence in the *TRO* cannot be interpreted to extinguish that right. Thus, the Commission approves SBC's proposed section 3.14.1.3.2, which provides that SBC may assess a fee (based on pre-existing time and material charges in the parties' pricing appendix) in those instances where SBC performs work at XO's request to establish a commingling arrangement. ~~SBC's proposed commingling charge is unsupported by discussion – much less, approval – in the TRO. Nor has SBC otherwise established the justification (whether practical or legal) for such a charge. As the FCC notes, commingling originated as a *regulatory* construct, not a practical one, intended to temporarily impede the admixture of Section 251 UNEs and wholesale services. TRO ¶ 579. In contrast, SBC's proposed commingling charge treats commingling as a practical task that differs from the practical tasks associated with linking, say, two Section 251 UNEs or two wholesale services. The Commission disagrees and, accordingly concludes that any cost of commingling is already recovered through SBC's rates for, respectively, UNEs and wholesale services, and any standard or extraordinary charges already imposed for provisioning such items. Additionally, we are concerned – though we need not decide here – that a discrete commingling charge could constitute an unreasonable condition on the procurement of wholesale services, per Section 251(c)(4)(B) of the Federal Act.~~

Exception No. 8:

For the reasons discussed in Section VIII of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue XO-4, which begins at page 21 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . .

The threshold issue concerns the effect of USTA II on the ILEC conversion duty established at TRO ¶ 586. The Commission agrees with SBC that *USTA II* has removed SBC's obligation to perform conversions. Thus, the Commission approves SBC's proposed language providing that it will perform conversions only when required to do so by lawful and effective FCC rules. ~~SBC contends that USTA II removed that duty wherever parallel service is available at wholesale. SBC Reply Br. at 11. However, the court neither said that nor overturned the FCC's imposition of the conversion obligation. Rather, it articulated principles for the FCC to consider while it revisited the qualifying/non-qualifying services distinction remanded (but not vacated) on other grounds by the court. Those principles focus on the state of competition, not on the availability of wholesale service. Specifically, the court stated that where wholesale services have produced "robust competition," impairment is precluded. 359 F.3d at 593. Similarly, (with respect to EELs in particular) the court said that "if history showed that lack of access to EELs had not impaired CLECs in the past," that would be "evidence" of future non-impairment. *Id*. Unless and until the findings suggested by the court are made, the TRO conversion duty remains in effect.~~

~~Moreover, the court expressly upheld the TRO's eligibility requirements for CLEC access to EELs, *id*., which the FCC specifically applied to conversions from special access. TRO ¶ 593. That ruling is inconsistent with SBC's position that USTA II overturned the conversion obligation created by the TRO. Accordingly, the Commission concludes that the conversion obligation survived USTA II.~~

. . .

Regarding order processing and timing, the Commission approves SBC's proposed section 3.15.4. That language would require the parties to use any existing ordering processes in place, and, "[w]here processes for the conversion requested . . . are not already in place," would direct the parties to follow the change management process. That process, which was extensively reviewed by the Commission in its Section 271 proceeding, will ensure that multiple ordering processes are not developed for different CLECs on an ad hoc basis. ~~SBC, despite having argued elsewhere in this~~

~~arbitration for precision, clarity and detail in the ICA, proposes that parties develop procedures in the future through the industry wide change management process associated with OSS. SBC Init. Br. at 18. Alternatively, SBC proposes to unilaterally develop processes at some unspecified future point. SBC proposed Section 3.15.4. SBC proposes no time limit for the completion of conversions.~~

For its part, XO proposes manually processing by SBC until an "ASR-driven conversion process" is developed. XO proposed Section 3.15.4. However, XO also asserts that the "necessary processes…already must be in place," including an ASR process, XO Init. Br. at 13, so it is not clear why XO's proposed text assumes that an ASR-driven conversion process still needs to be developed. SBC denies that an ASR process is already in place, SBC Init. Br. at 18; SBC Reply Br. at 15, while Staff calls the ASR process obsolete. Staff Init. Br. at 43.

~~Since the parties waived evidentiary hearings, the record does not permit us to make findings regarding the foregoing claims. We can only articulate principles that the parties should employ in their amended ICA. First, a clear conversion ordering process must be included in the ICA and immediately available once the arbitrated amendment is approved and in effect. The purpose of this proceeding is to incorporate the TRO, including its conversion mandates, into the Parties' ICA. Resort to the change management process unnecessarily and inefficiently postpones that incorporation indefinitely.~~

Exception No. 9:

For the reasons discussed in Section IX of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue XO-4, which begins at page 21 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . .

Regarding SBC's proposed non-recurring charges for processing conversions, there is no substantial disagreement that the charge we approved in Docket 02-0864[4], for conversions of special access to EELs and private line to UNE conversions, is appropriate here. SBC Reply Br. at 12; XO Reply Br. at 11; Staff Rep. Br. at 11. However, although SBC cites this "project administration charge" in support of including a conversion cost in the ICA, it is not clear that this charge is equivalent to what SBC characterizes as "service order charges and record change charges" in SBC proposed Section 3.15.3. If those latter charges address different underlying costs than does the administration charge, it was up to SBC to prove that fact. Moreover, our Order in Docket 02-0864 indicates that the activities associated with processing a conversion are either captured by the administrative charge or were disapproved for recovery in that case. Therefore, for conversion of access or private line to EELs, SBC should be limited to the amount of the project administration charge approved in Docket 02-0864.

For other conversions, the Commission approves SBC's proposal to assess service order and record change non-recurring charges to recover the costs it incurs in processing conversion service orders and performing billing record changes. Contrary to XO's suggestion, the TRO does not prohibit all conversion charges. Rather, it prohibits only certain "wasteful and unnecessary" charges that are not tied to the activities or costs actually associated with a conversion. Given that section 252 of the Act and the FCC's TELRIC pricing rules *require* CLECs to reimburse ILECs for costs they incur in providing UNEs to CLECs, XO's suggestion that the charges proposed by SBC Illinois fall into the category of prohibited wasteful and unnecessary charges is without merit. ~~the TRO precludes imposition of conversion charges. TRO ¶ 587. SBC misreads TRO ¶ 587, presuming that the FCC intended to bar only those nonrecurring charges associated with a new service. SBC Reply Br. at 12. First-time charges were simply one example of the charges prohibited by the FCC. The essential principle in ¶ 587 is nondiscrimination -- that is, since ILECs "are never required to perform a conversion in order to continue serving their own customers," *id*., CLECs would be~~

[4] Illinois Bell Telephone Co., Filing to Increase Unbundled Loop and Nonrecurring Rates, Order, June 9, 2004, at 214-15.

~~disadvantaged by conversion-related charges. To avert that result – which the FCC characterized as unjust, unreasonable and discriminatory within the meaning of Sections 202 and 251 of the Federal Act – the FCC knowingly subordinated ILEC conversion cost recovery to parity among competitors[5].~~

~~[5] We will not apply the parity principle to access to EEL conversions in order to avoid inconsistency with our holding in Docket 02-0864, which addressed charges solely under our state jurisdiction.~~

Exception No. 10:

For the reasons discussed in Section X of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue XO-2, which begins at page 16 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . .

The Commission approves ~~rejects~~ SBC's proposal to label the UNEs that SBC must commingle using the defined contract term "Lawful," ~~as "lawful."~~ For the reasons discussed more extensively in connection with SBC Issue 1~~, this is superfluous terminology that appears designed to confer unilateral power on SBC and is likely to engender wasteful litigation. In particular, we agree with XO and Staff that SBC's proposed application of the term "lawful" would enable SBC to unilaterally incorporate changes of law concerning UNEs into the Parties' ICA, in derogation of the ICA's existing change-of-law provision and the FCC's directive, in TRO ¶ 701, to use that provision to incorporate such changes. XO Init. Br. at 6-7; Staff Init. Br. at 38-39~~.

The Analysis and Conclusions section for Issue SBC-1, which begins at page 44 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC-1. The Commission adopts SBC's proposed "Lawful UNE" language. SBC Illinois' language appropriately reflects the scope of SBC Illinois' obligation to provide UNEs, stating that SBC Illinois is required to provide as UNEs only those network elements that are actually, and lawfully, UNEs. XO's proposed language, on the other hand, would have the inappropriate and unlawful effect of requiring SBC Illinois to provide, as UNEs, network elements that are not actually, lawfully UNEs.

SBC Illinois' language properly provides that SBC Illinois is required to provide only "Lawful UNEs," defined as "UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." This language

appropriately reflects SBC Illinois' obligations to provide UNEs under the *TRO* and the 1996 Act.

While section 251(c)(3) of the Act requires ILECs to "unbundle" certain network elements, Congress did not specify the particular network elements that must be unbundled. Rather, it directed the FCC to determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). Moreover, as the D.C. Circuit made clear in *USTA II*, it is the *FCC* that must determine which network elements satisfy the "impairment" requirement of section 251(d)(2), and thus must be offered as UNEs pursuant to section 2512(c)(3). *USTA II*, 359 F.3d at 561. In short, "the UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act" are limited to those "determined by lawful and effective FCC rules and associated lawful and effective FCC . . . orders," precisely as SBC Illinois' proposed contract language provides.

SBC Illinois' proposed contract language also provides that "Lawful UNEs" include those network elements that SBC Illinois is required to unbundle pursuant to "lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." Again, such language is required by the *TRO* and the 1996 Act. In the *TRO*, the FCC held that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *TRO*, ¶ 187. Rather, the FCC held, such actions must be "consistent with the Act" and with "the [FCC's] section 251 implementing regulations" (*TRO*, ¶ 193 & n.614), which is precisely what SBC Illinois' proposed language provides. This language is also directly supported by section 261(c) of the Act ("additional state requirements"), which states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with* [sections 251-261 of the Act] *or the [FCC's] regulations to implement* [those sections]." 47 U.S.C. § 261(c) (emphasis added).

Moreover, the *TRO* unequivocally "declassified" certain network elements, including OCn loops, OCn dedicated transport, and enterprise switching, holding that these facilities are no longer UNEs. These new rules were either not challenged on appeal, or were not disturbed on appeal. SBC Illinois' proposed contract language appropriately implements the *TRO* by classifying these facilities as "Declassified" rather than "Lawful UNEs," thus making clear SBC Illinois is no longer required to provide these elements as UNEs under the parties' contract.

~~The Commission rejects SBC's proposal to insert the term "lawful" in the sections of the amended ICA that SBC discusses in connection with SBC-1, and in connection with any other disputed issue in this arbitration as well. Such language is unnecessary, likely to trigger future disputes between the parties, and could be readily abused to delay XO's access to SBC services. Since XO cannot hope to successfully demand access to "unlawful" UNEs, inclusion of this term serves no constructive purpose.~~

~~Indeed, if such inclusion were necessary to the identification of what is permissible under the ICA, the "lawful" modifier would have to be inserted before every material noun in the ICA.~~

~~Similarly, SBC proposes to place the "lawful" modifier before references to the orders and/or rules of the FCC, the courts and this Commission. Unless they are under stay by a superior authority, such orders and rules are inherently lawful and effective. In effect, SBC's proposed language would empower SBC to implement the ICA by second-guessing – outside regular appellate processes – the viability of regulatory and judicial rulings.~~

~~SBC compounds its error by proposing, in SBC Section 1.1, to add the condition that "lawful" and "effective" orders and rules must also be "necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Thus, within the operation of the ICA, administrative and judicial decisions will be judged SBC for their consistency with SBC's view of the Federal Act and associated FCC regulations. At the logical extreme, nothing in SBC's proposed language would preclude SBC from holding that a conclusion in an administrative or judicial decision affronted the Federal Act, even when that decision expressly held to the contrary.~~

~~It is entirely reasonable for SBC to propose ICA language that will assure that SBC is not obligated to provide services at TELRIC prices unless those services, and the carriers requesting them, are entitled to such prices. It is entirely unreasonable to achieve the objective by empowering SBC to unilaterally adjudge the validity and viability of non-stayed judicial and administrative authorities. Moreover, by arrogating such power, SBC will elicit disputes with XO and delay XO's access to competitive services. The far better course is to employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved (by the process discussed in relation to SBC-2, below).~~

~~The answer, then, to SBC-1 is that SBC is not obligated to continue providing UNEs under the ICA when no such obligation exists under federal or state law. However, SBC's "unlawful" UNE scheme is ill-suited to excluding that obligation from the ICA.~~

. . .

SBC/X0-1b. The Commission disagrees ~~concurs~~ with XO and Staff that SBC's proposals would essentially replace the change-of-law provisions in the Parties' existing ICA with unilateral powers for SBC. XO Init. Br. at 29; Staff Init. Br. at 62. ~~Those provisions contemplate bilateral negotiations between the signatories. In contrast,~~ Nothing in SBC's amendatory contract language (e.g., SBC proposed Section 1.1) would empower SBC to decline to provide UNEs, based upon, first, its unilateral assessment of the ramifications of regulatory and judicial authorities, and, second, its

unilateral judgment of the efficacy of those authorities themselves, as XO suggests. ~~based on criteria we rejected above. Such provisions do not belong in the Parties' ICA, whether to incorporate changes already compelled by the TRO or any future changes associated with the TRO and USTA II.~~

Exception No. 11:

For the reasons discussed in Section XI of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue SBC-1, which begins at page 44 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . .

Thus, this Commission is presently reconsidering its unbundling power and associated decisions under, *inter alia*, state law, while the FCC is simultaneously reconsidering its own unbundling decisions under federal law, after the remand in USTA II. Within this state of flux, we must nevertheless determine how *presently existing* state authority and regulatory decisions are to be reflected in the Parties' ICA, without speculating about (or prejudging, with respect to Docket 01-0614) future developments. We conclude that our unbundling decisions, as well as the Section 13-801 authority on which they are premised, *presently* determine the state-based unbundling obligations of SBC (and XO's corresponding rights of access to unbundled elements). Therefore, ICA provisions that reflect these obligations and rights (e.g., XO proposed Section 1.1) should be included in the SBC-XO amended ICA. That language should be modified, however, to make clear that the Commission does not intend to purport to require SBC Illinois to comply with state law requirements if it has been determined that those requirements are inconsistent with federal law, because such a requirement would perforce be inconsistent with federal law as well.

Moreover, for purposes of the ICA, our presently effective rulings must be taken at face value. ~~Although SBC may believe that we have required unbundling under Section 13-801 (including TELRIC-priced unbundling) that exceeds what Section 251 would allow, that belief is irrelevant at present. Similarly irrelevant is the argument that our rulings are inconsistent with Section 261(c) of the Federal Act, which would contravene Section 13-801. Our currently viable unbundling rulings were based on our judgment that they are consistent with Section 261(c). Such judgment would have to be overturned on appeal or preempted through Section 253(d), not collaterally challenged in arbitration (or worse, unilaterally by SBC, within the context of the ICA).~~ Put simply, our unbundling mandates are effective today, and unless or until they are altered (whether by us or by superior authority) they must be incorporated in the Parties' ICA. Future unbundling developments should be accommodated through change-of-law provisions.

In view of the foregoing principles and conclusions, the Commission rejects XO's recommendation that only "final and non-appealable" non-impairment decisions will

terminate an SBC unbundling obligation. The terms of a non-stayed regulatory order must be obeyed.

The Analysis and Conclusions section for Issue SBC-4, which begins at page 61 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . .

Therefore, we conclude that XO's references to Section 271 are not permissible. ~~and state law are permissible. However, t~~To prevent over-reaching, and to keep XO's text within the boundaries of this arbitration, we revise XO's proposed Section 3.1.4 as follows: "SBC Illinois shall provide nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities, to the extent required by 47 CFR 51.319(A)(2), ~~Section 271 of the Act~~ and state law to the extent not inconsistent with federal law."

The Analysis and Conclusions section for Issue SBC-7, which begins at page 76 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

Taken literally, ...

First, we disagree with XO that the amended ICA should recognize any unbundling obligation imposed by Section 271 of the Federal Act, as explained above. ~~As we held previously in this decision, the TRO declares that Section 271 creates an unbundling requirement that is distinct from the Section 251 requirement, TRO ¶ 653, although 271 UNEs need not be TELRIC priced. TRO ¶ 659.~~ Any state-required unbundling should also be accounted for in the ICA, with the caveat the SBC Illinois is not required to adhere to any state-required unbundling requirements that have been found inconsistent with federal law.

Exception No. 12:

For the reasons discussed in Section XII of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue SBC-2, which begins at page 50 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

. . . .

SBC posits, however, that modification of the Parties' existing change-of-law provisions is "consistent with implementing the requirements of the *TRO*. In other words, to the extent the *TRO* created a new legal landscape which the Parties' existing change of law language is insufficient to reasonably and properly implement, then invoking the existing change of law process to negotiate a new change in law process that will accommodate the new legal landscape is perfectly appropriate."[6] SBC Init. Br. at 45. SBC's argument is conceptually valid. If modification of the Parties' present change-of-law provision were necessary to proper incorporation of the TRO into the existing ICA, then such modification would be within the scope of this proceeding.

~~However, that is not~~ That is the case here. To the extent that the TRO has determined that specific network elements no longer need to be unbundled (or offered at TELRIC prices) – and to the extent that such unbundling is not required under presently applicable state or federal law – those changes in law must be incorporated into the parties' agreement. ~~there is no need to establish a process for *identifying* those elements and *incorporating* them into the ICA. The FCC has already identified them. They can be incorporated by simply listing them in the Parties' amendment as elements that will not be unbundled (or TELRIC priced).~~ Indeed, one of the apparent purposes of this arbitration was to reflect such "declassifications" in the ICA. SBC's proposed declassification language does just that, by defining "declassified" UNEs to include those declassified by the *TRO*. With respect to these network elements, SBC's proposed language most clearly does not somehow inappropriately supplant the existing change of law processes, because those existing processes are no longer relevant. The *TRO*'s declassifications have already occurred, and the issue now is how to incorporate those declassifications into the parties' contract amendment. That is just what SBC's declassification language does, by specifically identifying and listing the

~~[6] To be clear, the Commission does not find that either party invoked the change-of-law process in their ICA in this instance. As the ALJ ruled, this arbitration was compelled by the TRO ¶ 703, which mandated that carriers will use Section 252 arbitration processes to incorporate TRO-related changes in their ICA, when that ICA is "silent" on legal change and transition timing. Since the change-of-law provision in the SBC-XO ICA contemplates negotiation, but has no dispute resolution mechanism to resolve an impasse (other than a reference to "applicable law"), the ALJ held that the ICA was "silent" and that the parties therefore defaulted to FCC-selected arbitration.~~

UNEs declassified by the *TRO*, and providing that those network elements will not be unbundled. XO's proposed contract language, on the other hand, fails to properly implement the *TRO*'s declassifications, because it does not even explicitly list those declassifications. Moreover, SBC Illinois' language properly identifies and reflects the UNE declassifications that have occurred as a result of *USTA II* (section 1.3.1.2), which must be reflected in the parties' contract amendment, while XO's language improperly (and unlawfully) ignores that federal law.

. . .

SBC's proposal is flawed in two respects. First, its proposed 30-day "transition" period is too short to serve the public interest. Irrespective of the impact of change on XO, the Commission's first concern is the welfare of XO's customers. Unless XO seamlessly absorbs the additional costs associated with the loss of unbundling, its customers (depending upon the available options in their agreements with XO) will likely need time to assess the effect of change on their own telecommunications budgets and to confer with XO (and, perhaps, SBC or other providers). ~~Second, SBC's transition procedure is linked to other proposed SBC provisions (discussed above) that allow SBC to make unilateral and inappropriate judgments regarding the content and validity of federal and state laws, orders and regulations.~~

. . .

Exception No. 13:

For the reasons discussed in Section XIII of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order as indicated below:

The Analysis and Conclusions section for Issue SBC-5, which begins at page 66 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC-5a. The parties have settled this sub-issue.

. . .

Substantively, we agree with SBC and Staff that there are not currently effective FCC rules requiring that dark fiber transport be unbundled, and with SBC that there are not currently effective FCC rules requiring that dark fiber loops be unbundled. SBC Init. Brief at 65, fn. 29; Staff Reply Br. at 30. The court of appeals vacated and remanded the FCC's national impairment finding with respect to dedicated transport and high capacity loop elements, including dark fiber. USTA II, 359 F.3d at 594. Thus, the parties' contract amendment must reflect that there currently is no unbundling requirement with respect to high capacity loops or dedicated transport, including dark fiber loops or dark fiber dedicated transport. ~~Since the sole purpose of this arbitration is to incorporate viable elements of the TRO into the SBC/XO ICA, nothing remains, under federal law, for incorporation with regard to dark fiber transport.~~

For the same reason, SBC Illinois is not currently required to provide EELs, including XO's so-called "dark fiber EEL." The FCC defines an EEL to include only a combination of an unbundled loop and unbundled dedicated transport. 47 C.F.R. § 51.5; TRO, ¶ 575. But because SBC Illinois is not currently required to provide either of those UNEs, there are in essence no UNEs available to combine to form an EEL. ~~However, the Commission does not agree with SBC that the TRO provisions pertaining to access to EELs, including dark fiber EELs[7], were overturned by USTA II. Although an EEL includes a transport component, it is not transport. It is a different, more comprehensive service that plays a particular role in promoting market competition. TRO ¶ 576. Access to EELs is accorded separate treatment and analysis in the TRO and USTA II, apart from the treatment and analysis accorded access to dedicated transport[8]. *E.g.*, TRO, ¶ 575 *et seq.*; USTA II, 359 F.3d at 590.~~

[7] ~~We also disagree with SBC's assertion that dark fiber EELs were not "contemplate[d]" in the TRO. SBC Reply Br. at 49. A dark fiber EEL is simply a combination of separate elements, as described by the FCC. TRO ¶575. DS1 and DS3 are merely capacity designations for the same facilities that can be "lit" or left "dark."~~

[8] ~~We distinguish EEL access here from EEL pricing. Given the reversal of the FCC's impairment finding, it is not clear that the dedicated transport component of an EEL is currently subject to TELRIC pricing under federal law.~~

~~XO says that its "primary concern" with SBC's proposed text is that SBC's collocation requirement (in the SBC central office(s) where the pertinent fiber terminates) would prevent XO from obtaining dark fiber EELs. XO Reply Br. at 44. XO acknowledges that a collocation requirement is generally valid, but avers that collocation need not be at the particular SBC central office where dark fiber terminates. *Id*., 44-45. We agree, and find SBC's rationale for its proposed provisions unpersuasive. The TRO passages on which it relies (¶ 313 and ¶ 382) do refer to "necessary…collocations" but do not address – much less establish a rule about – where collocation must occur.~~

~~We agree with XO that the FCC concluded that EELs facilitate competition, innovation and efficient deployment of resources. TRO ¶ 576. Accordingly, the Commission holds that collocation within the pertinent LATA can constitute the "necessary collocations" referred to in the TRO. We note that XO will still be subject to the eligibility criteria promulgated by the FCC in the TRO, as incorporated into the Parties' ICA.~~

~~Regarding state law, XO is correct that this Commission held in Docket 01-0614 that Section 13-801 of the PUA does not countenance a collocation requirement for termination of EELs. It certainly follows that state law does not require collocation *at a specific central office* for dark fiber EELs. Additionally, although SBC charges that XO presented no "evidence" that SBC's proposed collocation requirements would fail to implement the maximum development of competitive service offerings, as Section 13-801 mandates, the FCC has concluded that EELs reduce a CLEC's collocation costs, thereby (as noted above) "facilitat[ing] the growth of facilities-based competition in the local market." TRO ¶ 576. That is sufficient refutation of the competition-enhancing potential in SBC's collocation requirement. Therefore, we conclude that SBC's dark fiber loop collocation requirement should be modified so that collocation at an SBC central office *within the LATA* satisfies the requirement.~~

~~Moreover, the vacatur of impairment rulings in the TRO by USTA II does not mean that the there are no effective federal rulings on EELs. The viability and impact of, *e.g.*, the Local Competition Order and USTA I, must be assessed. That said, the parties do not present here an open issue on EEL pricing and we reach no conclusions on that subject.~~

Exception No. 14:

For the reasons discussed in Section XIV of SBC Illinois' Brief on Exceptions, the Commission should modify the Proposed Order to remove the entire section titled "deficient framing of open issues," which begins at page 2 of the Proposed Order. In addition, the Commission should make the following modification:

The Analysis and Conclusions section for Issue SBC-8, which begins at page 78 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

~~This is another improperly framed issue. Again, the Commission is not presented with an open and two-sided dispute, but, instead, SBC's request to consider the general subjects of call-related data bases, LIDB and CNAM.~~

~~Additionally,~~ XO's Position Summary merely refers the Commission to its proposed text, and identifies no disputed questions and stakes out no positions. This presumably reflects the fact that XO does not use SBC's call-related databases in connection with its facilities-based operations. In any event, XO's proposed text does not "speak for itself" with respect to identifying disputes or supporting arguments, and it is not the Commission's responsibility to cull that text to discern what the disputed language or supporting arguments might be. Therefore, the Commission adopts SBC Illinois' proposed language. SBC Illinois has explained and supported its proposed language, and the Commission agrees with SBC Illinois that its language is necessary and appropriate to implement the *TRO*. In light of XO's failure to explain its objection to SBC's language, the Commission can discern no reason to disapprove SBC's proposed language. ~~pursuant to the directions of the ALJ regarding Position Summaries, there are no XO arguments for us to consider.~~

~~Accordingly, the Commission will make no ruling with respect to SBC Issue 8, except to hold, for the sake of consistency, that principles and conclusions articulated elsewhere in this Decision are applicable here as well. Specifically, Section 271 obligations should be accounted for in any amended ICA provisions pertaining to call-related data bases, LIDB and CNAM, with the understanding that TELRIC prices are not associated with Section 271 under federal law.~~

The Analysis and Conclusions section for Issue XO-4, which begins at page 21 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

~~SBC's reframed version of XO Issue 4 (SBC/XO 4) is among those not properly presented as an open arbitration issue. It is a general and over broad question that calls upon the Commission to draft a portion of the Parties' ICA, not to resolve a dispute. Taken literally, it asks us to start from scratch on the subject of conversions, and to select every term and condition that will and will not apply. XO's version of this issue, when taken at face value, merely asks whether SBC must comply with FCC conversion rules. The answer to that question is self evident and gets the parties no closer to interconnection. Patently, the real disputes here concern specific TRO directives concerning conversion, but XO did not properly frame those disputes as open issues. Consequently, the Commission will identify those disputes that significantly impede amendment of the Parties' existing ICA and provide guidelines for resolution.~~

The threshold issue . . .

The Analysis and Conclusions section for Issue XO-5, which begins at page 27 of the Proposed Order, should be modified as follows:

XO's version of this issue is easily resolved – FCC rules permit XO to provide non-qualifying services using the same UNES it uses for qualifying services. TRO ¶ 143. SBC does not dispute this.

~~As for SBC's version of XO 5 (SBC/XO 5), a resolution of the issue, as phrased, would not address the actual disputes presented. That is, SBC is not really asking us to determine whether contract terms should be "clearly set forth," but to decide several specific – but unframed – issues concerning what those terms should be. Again, the presentation of differing contract provisions is not the same as framing issues, and it is not up to the Commission to determine what disputed issues arise from those provisions. That said, we will resolve those actual disputes between the parties that we find to be essential to completing ICA provisions addressing the mixture of qualifying services and non qualifying services.~~

First, . . .

~~We will render no judgment on the remaining terms proposed by SBC, since, as noted above, SBC framed no particular issues about them.~~

The Analysis and Conclusions section for Issue XO-7, which begins at page 35 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

~~Again, the parties fail to properly frame their disputed open issues for arbitration. SBC requests broad guidance on a topic, while XO poses a question (in essence, "should SBC comply with FCC rules?") that not only answers itself, but produces an answer SBC would not dispute. Such questions move the parties no closer to interconnection. Thus, the Commission will address those disputed factors that we perceive to be fundamental to drafting ICA provisions regarding audits.~~

We agree . . .

The Analysis and Conclusions section for Issue SBC-2, which begins at page 50 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

~~SBC-2 is another over-broad request for guidance on a general subject matter, rather than a proper framing of specific open issues. SBC/X0-2b is similarly deficient, as well as substantively duplicative of SBC-1. Accordingly, we will specifically resolve SBC/XO-2(a) and (c), and those related disputes concerning UNE "declassification" that we view as impediments to amending the ICA.~~

SBC/XO-2a & 2b. . . .

The Analysis and Conclusions section for Issue SBC-4, which begins at page 61 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC-4a & c. The arbitrating parties appear to have settled these sub-issues.

~~The Commission notes that SBC-4c was improperly framed as an open issue. Furthermore, to the extent that the parties belatedly attempted to modify the many discrete disputes residing under this over-broad question, those disputes were presented as dueling texts, not as properly framed open issues. Moreover, SBC avers that we *cannot* address issues posed outside of the Petition and Response, SBC Init. Br. at 65, and we agree. Therefore, even if those disputes have not been settled, the Commission will not address them.~~

SBC-4b. . . .

The Analysis and Conclusions section for Issue SBC-5, which begins at page 66 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC-5a. The parties have settled this sub-issue.

SBC-5b. ~~This sub-issue is not properly framed as an open issue. It is an invitation to the Commission to discourse on the subject of dark fiber, and to devise rules from the ground up, rather than the presentation of a dispute.~~

Substantively, we agree . . .

The Analysis and Conclusions section for Issue SBC-6, which begins at page 72 of the Proposed Order, should be modified as follows:

2. Analysis and Conclusions

SBC 6a-c. . . .

SBC 6-d. T~~his is another improperly framed general question, rather than an appropriate open disputed issue. Nevertheless, t~~he Commission will furnish essentially the same resolution we provided for SBC-3c, for essentially the same reasons. Thus, SBC's proposed language should be modified to provide written or electronic notice to XO and a fair, but specific, time interval in which XO can object or select alternative treatment for an excessive circuit request. Objections should be resolved through the ICA dispute resolution mechanism, and the status quo should not be altered pending such resolution.